NO. 87-1108

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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VICTOR R. VERMEULEN, M.D., and
VICTOR R. VERMEULEN, M.D., INC.,
Petitioners,

vs.

CARL E. HARDY, M.D.,
Respondent.

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## BRIEF OF AMICUS CURIAE OHIO HOSPITAL ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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James S. Monahan*
Elisabeth A. Squeglia

BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

Attorneys for Amicus Curiae
Ohio Hospital Association

*Counsel of Record

COURT INDEX PRESS, INC — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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Amicus Curiae Ohio Hospital Association supports Petitioners Victor R. VerMeulen, M.D., and Victor R. VerMeulen, M.D., Inc., petition for a writ of certiorari to review the judgment and opinion of the Ohio Supreme Court in this case.

## CONSENT OF THE PARTIES TO THE FILING OF BRIEF BY AMICUS CURIAE OHIO HOSPITAL ASSOCIATION

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the parties to this action hereby consent to the filing of a brief by Amicus Curiae Ohio Hospital Associa-

tion in support of the Petition for a Writ of Certiorari prior to consideration of the Petition for a Writ of Certiorari.

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Earl F. Morris
James E. Pohlman
William M. Todd*
Terri-Lynne B. Smiles

PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
(614) 227-2000

Robert L. Herron
P.O. Box 1499
Columbus, Ohio 43216

Attorneys for Petitioners

---

Jerry L. Maloon
Jeffrey L. Maloon*

JERRY L. MALOON CO., L.P.A.
501 South High Street
Columbus, Ohio 43215
(614) 469-7833

Attorneys for Respondent

*Counsel of Record

## INTEREST OF AMICUS CURIAE OHIO HOSPITAL ASSOCIATION

Amicus Curiae Ohio Hospital Association is an Ohio non-profit corporation with over two hundred (200) member hospitals in the state of Ohio. The Ohio Hospital Association is vitally interested in all matters of public policy which will have a significant impact on the quality, availability or cost of health care in Ohio.

The decision in this case rendered by the Ohio Supreme Court will adversely affect the quality, availability and cost of health care in Ohio. The Ohio Supreme Court's holding that Ohio Rev. Code § 2305.11(B) violates Section 16, Article I of the Ohio Constitution, and the Ohio Supreme Court's application of that holding and its prior holding in *Oliver* v. *Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983), to retroactively reopen a cause of action long barred under the statute of limitations and prior decisional law will have a substantial adverse effect on all hospitals and health care consumers in the state of Ohio, as set forth in further detail in the Argument of Amicus Curiae Ohio Hospital Association.

For these reasons, the Ohio Hospital Association respectfully submits that the interest of its members in this case is substantial, and that the Brief of Amicus Curiae Ohio Hospital Association sets forth facts for the Court's consideration which are of relevancy to the disposition of this case.

## SUMMARY OF ARGUMENT

This case arises out of medical treatment provided by Petitioner Victor R. VerMeulen, M.D. ("Dr. VerMeulen") to Respondent Carl E. Hardy, M.D. ("Dr. Hardy") in early 1973, during the course of a physician-patient relationship which terminated in early 1974. Under the statute of limitations and all caselaw interpreting it which was in effect during the relevant time period and for many years thereafter,

the statute of limitations on Dr. Hardy's claim began to run in 1974, and expired one year thereafter, in 1975. The Ohio Supreme Court decision which Petitioners seek to have reviewed by their Petition for a Writ of Certiorari had the effect of reopening the statute of limitations and permitting Dr. Hardy's action to be brought, notwithstanding the fact that such action had been barred by the expiration of the statute of limitations some ten years earlier.[1]

In this brief, Amicus Curiae Ohio Hospital Association will argue that the Ohio Supreme Court's decision is of broad general application to all medical malpractice cases in Ohio and will have the effect of eliminating any definitive, meaningful limitations period relative to such cases. Furthermore, Amicus Curiae Ohio Hospital Association will argue that the retroactive application of that decision to all cases previously barred under Ohio Rev. Code § 2305.11 will result in flooding the courts with cases long thought barred, the defense of which will be extremely difficult due to the passage of time. The decision of the Ohio Supreme Court and its retroactive application to cases barred under previous caselaw is in violation of the due process clause. U.S. CONST. amend. XIV, § 1.

Finally, Amicus Curiae will argue that the Ohio Supreme Court's decision will result in a severe destabilization of the

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[1] The Ohio Supreme Court also remanded this action to the Court of Common Pleas for further action. In late December, 1987, Respondent attempted to voluntarily dismiss the action without prejudice in the Court of Common Pleas, and now takes the position that such voluntary dismissal renders the Petition for a Writ of Certiorari moot. Respondent's action to dismiss this case has no effect on this appeal. Pursuant to Ohio Rev. Code § 2305.19, Respondent's dismissal without prejudice is not a final disposition of this case because Respondent may refile such action within one year of the dismissal. To hold that such dismissal renders the Petition for a Writ of Certiorari moot would deprive Petitioners of their right to petition this court for review, and bind them under the Ohio Supreme Court's holding in any refiled action. Principles of due process mandate that the losing party retain the right to request review from a higher court until the time for making such a request or filing an appeal has run.

medical malpractice insurance market reflected in soaring premium costs and availability problems which will threaten the very foundations of our health care delivery system, to the serious detriment of health care providers and health care consumers alike in Ohio.

## ARGUMENT

**THE DECISION OF THE OHIO SUPREME COURT IN THIS CASE, AND THE RETROACTIVE APPLICATION THEREOF TO CASES BARRED UNDER PRIOR CASELAW, EFFECTIVELY ABOLISHES ANY DEFINITIVE LIMITATIONS PERIOD AND JEOPARDIZES A DEFENDANT'S ABILITY TO DEFEND AGAINST A MEDICAL MALPRACTICE CLAIM, IN VIOLATION OF THE DUE PROCESS CLAUSE, U.S. CONST. AMEND. XIV, § 1.**

Prior to July 28, 1975, the statute of limitations in Ohio for medical malpractice claims, Ohio Rev. Code § 2305.11, required that a cause of action in medical malpractice be brought within one year after the cause accrued. The operative word in the statute, "accrued", had long been defined by the Ohio courts as that point in time when the relationship between the physician and the patient was terminated. *Wyler* v. *Tripi*, 25 Ohio St. 2d 164, 267 N.E. 2d 419 (1971); *Gillette* v. *Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902). The only statutory exception to this one year rule was that the statute was tolled for persons who, at the time of accrual, were minors or were suffering from some other legal disability, until the person reached the age of majority or until the disability was removed. Ohio Rev. Code § 2305.16. One further exception was created by court decision: in the case of a foreign object left in a patient's body during surgery, the statute was tolled until the foreign object was discovered. *Melnyk* v. *Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E. 2d 916 (1972).

Years of sound public policy decisions by the legislature, and reasoned applications of those same policies by the Ohio courts resulted in a system which remained exceedingly stable for many decades. However, in the early 1970's, rapid and large increases in both the number of malpractice claims and the size of awards caused a national crisis in the malpractice insurance market. This crisis, characterized by soaring

premiums and the unavailability of coverage at any cost to certain high risk medical specialities and institutions, threatened to add greatly to already high health care costs and to force certain providers of health care services to high risk cases out of the health care business entirely. This crisis is one which has been well documented by various commentators. *See, e.g.*, U.S. Dep't. of Health, Education and Welfare, *Report of the Secretary's Commission on Medical Malpractice* (1973); Sheehan, *The Medical Malpractice Crisis: How It Happened and Some Proposed Solutions*, 11 Forum 80 (1975); Nat'l. Conference of St. Legislatures, *A Legislator's Guide to the Medical Malpractice Issue* (1976); A.B.A., *Report of the Commission on Medical Professional Liability* (1977).

Ohio was not immune from this crisis, and by 1975 Ohio health care providers faced an increasing refusal of insurance carriers to write medical malpractice coverage, and a dramatic increase in premiums charged by those carriers which continued to write policies. Some carriers continued to write policies, but excluded those specialists such as neurologists and anesthesiologists who were viewed as "high risk". The result was potentially devastating to the health care system. Rates for medical services began to steeply increase as a result of soaring malpractice premiums. Many health care providers, especially those in the "high risk" specialties, began to seriously contemplate discontinuance of services, or the limitation of their practices to less risky cases. Some institutions faced the choice of going forward without coverage or restricting their services. *See* Comment, *Malpractice and the Statute of Limitations in Ohio*, 10 Cap. U. L. Rev. 711 (1981); Gouldin & Gouldin, *The Medical Malpractice Insurance Crisis*, 3 Ohio N.U.L. Rev. 510 (1975).

In mid-1975, amid much debate and after long months of careful consideration, the Ohio General Assembly enacted Am. Sub. H.B. 682, 111th General Assembly, 136 Laws of Ohio H682 (eff. 7-28-75), which was designed to ease the growing malpractice crisis. The bill, as enacted, was a com-

promise which took into consideration the position of many different groups representing the insurance industry, health care providers and the plaintiff's bar. One of the key provisions of Am. Sub. H.B. 682 was a revision of the malpractice statute of limitations to enact a four year statute of repose. Ohio Rev. Code § 2305.11(B). This new statute of repose created an absolute limitation on actions in medical malpractice of four years after the *occurrence* of the alleged act of malpractice, regardless of the date the cause of action accrued. Furthermore, the four year absolute limitation was made applicable to all persons regardless of legal disability, with a limited exception for minors under the age of ten, which exception gave them until their fourteenth birthday to bring an action.

Beginning in 1983, a series of Ohio Supreme Court decisions turned upside-down both the long-standing prior decisions of that court interpreting the malpractice statute of limitations and the 1975 legislative changes enacted in response to the malpractice crisis. *See Oliver* v. *Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983); *Schwan* v. *Riverside Methodist Hospital*, 6 Ohio St. 3d 300, 452 N.E. 2d 1337 (1983); *Opalko* v. *Marymount Hospital, Inc.*, 9 Ohio St. 3d 63, 458 N.E. 2d 847 (1984); *Mominee* v. *Scherbarth*, 28 Ohio St. 3d 270, 503 N.E. 2d 717 (1986); *Frysinger* v. *Leech*, 32 Ohio St. 3d 38, 512 N.E. 2d 337 (1987); *Hardy* v. *VerMeulen*, 32 Ohio St. 3d 45, 512 N.E. 2d 626 (1987); and *Hershberger* v. *Akron City Hospital*, 34 Ohio St. 3d 1, 516 N.E. 2d 204 (1987). The net result of these sweeping changes in decisional law is that Ohio currently has no definitive, predictable, or even meaningful statute of limitations on medical malpractice actions, and the Ohio General Assembly may not be able to structure a workable new statute of limitations within the constitutional parameters defined by these decisions.

The current malpractice statute of limitations in Ohio is as follows: an action in medical malpractice may be brought within one year after the cause accrues. "Accrual" is defined as the later of that point in time when the patient discovers or

reasonably should have discovered the resulting injury, or the physician-patient relationship is terminated. *Frysinger* v. *Leech, supra.* For purposes of determining when the resulting injury is or should have been discovered, the Ohio Supreme Court has adopted a complicated three-pronged test which requires multiple factual determinations to apply. *Hershberger* v. *Akron City Hospital, supra.* The result is that a statute of limitations defense to a medical malpractice action in Ohio will be nearly impossible to raise successfully without the benefit of a trier of fact.

Thus, under current decisional law, providers of medical treatment in Ohio are, theoretically, *forever* subject to the threat of suit. There is absolutely no way to calculate, with any reasonable assurance of accuracy, a definite time period after which they are free from the threat of suit. Perhaps more importantly from the perspective of the public interest, medical malpractice insurers will no longer be able to reasonably predict their potential liability, with the-result of soaring malpractice insurance premiums and availability problems which have the potential to far overshadow the malpractice crisis of the 1970's. Such a scenario can only seriously jeopardize our health care delivery system as we know it today.

In the face of these problems, medical malpractice insurers have no way to adequately predict long term liability, and must assume a high potential liability and reserve accordingly, a necessary practice which leads to higher premiums. However, in the early 1970's insurers found that, despite this practice, claims often exceeded reserves, and were forced to increase premiums drastically to cover the difference. It is reasonable to assume that malpractice insurers in Ohio are likely to experience the same problems in the future.

The economic impact of the 1970's crisis on hospitals was potentially staggering. Over the three year period from 1970 to 1972, premium costs for basic liability coverage for hospitals increased approximately 50 percent. Among other things, this upward trend in premiums reflects a drastic in-

crease in the number of claims against hospitals. Between 1967 and 1970, the number of claims against hospitals increased by 75 percent. U. S. Dep't. of Health, Education and Welfare, *Report of the Secretary's Commission on Medical Malpractice* (1973), at 610. However, as noted by the American Bar Association, the enormous increase in premiums was just the tip of the iceburg:

> It is likely that the costs of insuring against medical liability will continue to rise, and that the proportion of costs now assessed against hospitals . . . will increase . . . Multi-defendant claims, which almost always involve a hospital as one defendant, constitute 43 percent of all claims filed but almost 75 percent of all loss dollars paid. If substantial numbers of physicians decline to purchase insurance due to escalating costs, the larger financial resources of the hospital will inevitably be called upon to "bail out the doctor" in a multi-party suit situation.

A.B.A., *Report of the Commission on Medical Professional Liability* (1977), at 29.

There is evidence that the affordability of malpractice insurance is again being affected by soaring claims and awards. Richards, *Malpractice Losses Are Building — Again*, Hospitals, September 16, 1984, at 108. While coverage in some form is still available to most providers, most malpractice insurance carriers have, in the last several years, discontinued occurrence type policies in favor of claims made policies.[2] The effect of this shift is to force providers to continue to purchase "tail" coverage after they have ceased offering services (and ceased earning an income therefrom), or risk uninsured claims against them. The Ohio Supreme Court decision will only serve to increase drastically the cost of all

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[2] An occurrence type policy provides coverage for any claim which is based upon an occurrence during the policy period regardless of when the claim is made. Claims made policies only cover claims made during the policy period.

medical malpractice coverage, including "tail" coverage, both because of the increased future risk to insurance companies, and because of unanticipated losses on old occurrence type policies. Such costs are, of course, passed on to the consumer in the form of a higher price for health care services.

The problems created by retroactive application of the Ohio Supreme Court decision to reopen cases long thought barred, as was done in this case, are even more frightening. There is the potential for the courts to be flooded with cases long barred under prior caselaw, and based upon treatment rendered years and even decades earlier — cases for which the malpractice insurers have not reserved and which the defendants no longer recall.

If the Ohio Supreme Court is permitted to apply the current interpretation of the malpractice statute of limitations retroactively to cases long barred under prior interpretations, as was done in this case, claims could be brought based upon treatment rendered and relationships terminated decades before. With today's rapidly changing modern medical science, not only do memories fade, records become lost, and facts become stale over years and decades of time, but medical standards may change so dramatically that it is often difficult to reconstruct what the standard of care was decades ago, and patently unfair to apply today's standard to treatment rendered a generation earlier. Thus, a defendant's ability to defend against such a claim is severely hampered by the passage of time, until, at some point, the problems of proof reach such proportions as to deprive the defendant entirely of the ability to defend against these claims.

The problem is probably best illustrated by a comparison of medical malpractice claims with automobile accident liability claims. In the case of an automobile accident liability claim, there is a specific point in time where a known, identifiable and reportable incident occurs, i.e. an auto accident. Although the parties may not know at the time the accident occurs whether it was negligently caused, and may not even

know the extent of their injuries, there is no question that an accident occurred and that they do know many facts which will form the basis of any eventual claim: e.g. the time and place of the accident, the number of vehicles involved, the number of persons involved and their ages, and the circumstances surrounding the accident. An accident report is generally made to the police department, and a claim filed with the respective insurance companies. The insurance companies are then in a position to investigate further, evaluate potential claims, and reserve funds and adjust premiums as necessary to accommodate any action which might later be brought. Likewise, potential defendants are in a position to record their impressions for use in defense of a subsequent claim against them.

Contrast, for example, the case of a malpractice claim against a physician and hospital which arises out of injury to a child allegedly sustained at birth. In such a case, the hospital likely provided a multitude of services over a period of days to the infant and its mother during and shortly after birth, and then never saw the child or its parents again. Neither the hospital nor its insurer had any way of knowing if the child sustained some injury as a result of the services rendered until the child or its representative decided to pursue a claim. With rare exceptions, there is generally no specific, identifiable incident—no "accident" to report at the time medical treatment occurs. If a claim is not brought for many years, and neither the hospital nor the insurer is on notice of a potential claim, and there is no way to assure that records are preserved and memories are recorded. Moreover, the hospital must rely on the recall of its employees who assisted in the delivery and treated the newborn infant to supplement whatever written record is available, employees who may not be readily identifiable or reasonably located many years after the event.

In such a case, the child's mother will typically sincerely believe she remembers, with great clarity, everything that took place in the delivery room on that very important day in

her life, despite the fact that her recall has probably been colored by the comments and experience of others described to her over the years. The physician, on the other hand, has delivered hundreds and perhaps thousands of infants in the years since the delivery in question. He is unlikely to have any personal recall of that particular birth, and the medical records of the pregnancy and delivery may or may not be still available, depending on the amount of time which has lapsed. However, no matter how detailed available records may be, in order to adequately defend the case, the records will inevitably have to be supplemented by the physician's own recall of his practices and procedures at the time in question, if not his recall of the specific case. Thus, in the case of many of these stale claims, problems of proof become so severe that the due process normally afforded by the courts is rendered meaningless.

Overall, the Ohio Supreme Court's decision and the retroactive application of that decision and others to cases long barred under prior case law will effectively eliminate any meaningful statute of limitations on medical malpractice claims in Ohio, and seriously impair a defendant's ability to reconstruct the facts of a case and defend against stale claims, in violation of the due process clause. U.S. CONST. amend XIV, § 1. Retroactive application will also make it nearly impossible for an insurance company to adequately reserve for future losses, dramatically increase the cost and jeopardize the availability of medical malpractice insurance, and increase health care costs and threaten the viability of our health care delivery system as we know it today. The impact of this decision will ultimately be felt by all health care providers and health care consumers in the State of Ohio.

## CONCLUSION

For these reasons, Amicus Curiae Ohio Hospital Association urges the Court to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

James S. Monahan*
Elisabeth A. Squeglia

BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

Attorneys for Amicus Curiae Ohio Hospital Association

*Counsel of record